

No. 2399

IN
**The United States Circuit
Court of Appeals**
For the Ninth Circuit

WESTERN UNION TELEGRAPH CO.

AND

SOUTHERN PACIFIC CO.

APPELLANTS

VS.

POSTAL TELEGRAPH CO.

APPELLEE

Appellants' Brief

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON

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Appellants,

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POSTAL TELEGRAPH CO.,
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*Appeal from the District Court of the United
States for the District of Oregon.*

STATEMENT OF THE CASE

In the year 1907, the Pacific Postal Telegraph Company, the predecessor in interest of the complainant in the present suit, commenced an action against the Oregon & California Railroad Company and the Southern Pacific Company, its tenant, for the purpose of appropriating the right

of way of those companies, from the City of Portland in Multnomah County, Oregon, to the state line between the States of California and Oregon, for a telegraph line to be constructed and maintained by the complainant.

Complainant alleged that the damages to be sustained by the defendants by reason of such appropriation would be the sum of \$2100; but on trial being had to a jury, the damages of the defendants were assessed in the sum of \$66,600. The Pacific Postal Telegraph-Cable Company did not take advantage of its right to pay that sum as compensation and use the Southern Pacific's right of way for its telegraph line, but instead waited nearly four years without taking any action whatever, and then commenced the present suit, as the Postal Telegraph Company, against the Southern Pacific Company, to establish its right to repair, maintain and construct its lines upon the railroad's right of way by reason of an alleged adverse, uninterrupted and notorious possession of over twenty-four years.

The Western Union Telegraph Company was not originally a party to the proceedings, but after the case had come to issue and after a part of the testimony had been taken was brought in as a defendant through the medium of a supplemental bill filed for the purpose of setting up a new state of facts which had in the meantime arisen.

BILL OF COMPLAINT

It is alleged in the original bill, filed August 25, 1911, that the Southern Pacific Company owns a leasehold interest in the railroad right of way of the Oregon & California Railroad Company, from Eugene in Lane County, Oregon, to New Era, in Clackamas County, a distance of 103 miles, upon part of which right of way the complainant maintains a telegraph line.

That the Pacific Postal Telegraph-Cable Company, the predecessor in interest of complainant (which corporation had duly accepted the provisions of the "Post Roads Act of Congress"), constructed a telegraph line along said right of way more than twenty-four years ago; that between New Era and Eugene the greater number of poles of said telegraph line are not upon the defendant's right of way, but upon land adjoining, and in some places where the poles are upon land adjoining the cross-arms and wires overhang the right of way.

That complainant's predecessor in interest, the Pacific Postal Telegraph-Cable Company, erected said poles or strung the wires thereon without permission or license from the Southern Pacific or the Oregon & California Railroad Company, and for more than twenty-four years its possession has been open, notorious, peaceable, adverse, continuous and uninterrupted.

That the defendant leased the said right of way from the Oregon & California Railroad Com-

pany subject to the rights of the Postal Telegraph Company and the burden of its telegraph line upon the said right of way.

That the Oregon & California Railroad Company was one of the so-called land grant rail roads.

That complainant's telegraph line does not interfere with the operation of the defendant's railroad, and the part of the right of way occupied by the Postal Company is not needed for railroad purposes, and that the Postal Company will not attach its wires or fixtures to defendant's bridges, trestles, buildings or structures.

That complainant has accepted the provisions of the act of July 24, 1866, and therefore has the right to maintain its telegraph line on the right of way of defendant.

That complainant has the right to maintain its line as aforesaid without payment of compensation to defendant, but offers one dollar per mile for the land on said right of way as a gratuity.

It is further alleged, that owing to the wear and tear of the elements and in order to properly handle the business entrusted to complainant by the public and the United States government, it is imperative that complainant's telegraph line be at once repaired and reconstructed.

That although the Southern Pacific Company's assistant general manager has informed the Postal's duly authorized agent that it would

prevent complainant, by force and violence if need be, from repairing and reconstructing said telegraph line. nevertheless complainant on or about July 25, 1911, set about repairing and reconstructing its said line in a careful manner and so as not to interfere with the operation of defendant's railroad, planting new poles in identically the same portions of ground that had been occupied by the old and worn poles; but the defendant on July 28, 1911, sawed off ninety of the new cross-arms and greatly damaged complainant's line and threatens to prevent any further repairing or reconstruction of said telegraph line with force and violence.

The prayer of the bill is for an injunction restraining the defendant from in any way interfering with the repair, construction, improvement and maintenance of complainant's telegraph line on the defendant's right of way between New Era and Eugene.

ANSWER OF SOUTHERN PACIFIC COMPANY

The answer of the Southern Pacific Company denies the allegation of open, notorious, peaceable, adverse, continuous and uninterrupted possession by complainant, and denies that the telegraph line of complainant does not interfere with the operation of defendant's railroad.

For affirmative defense, it is alleged that in November, 1886, while defendant's predecessor,

the Oregon & California Railroad Company, was in the hands of a receiver of the United States Circuit Court, the Pacific Postal Telegraph-Cable Company, complainant's predecessor in interest, presented a petition to said court asking that it be allowed to place its poles, cross-arms and wires upon the right of way of said railroad, upon condition that it should allow the same to remain upon said right of way for such time as the receiver should be in possession of said road. That an order was made granting the prayer of such petition on September 18th, 1886. Copies of the petition and order are set forth in the answer.

It is alleged that such occupancy as the plaintiff and its predecessor have on said right of way was taken under the permission granted by said order of the court, and that at the close of the receivership the poles and overhanging cross-arms of the complainant's predecessor were allowed to remain by permission and sufferance of defendant, on the right of way between New Era and Eugene.

It is further alleged that in the past five years the use of the entire right of way of defendant for railroad purposes has become necessary, particularly on account of the installation of a block signal system, and for that reason it has become necessary to revoke the permission granted to complainant's predecessor.

For a second affirmative defense, the defendant set up the proceedings in the former

suit hereinbefore referred to filed October 25, 1907, by the Pacific Postal Telegraph-Cable Company against the Oregon & California Railroad Company and the Southern Pacific Company, to condemn a portion of the defendant's railroad right of way in the State of Oregon, alleging that the judgment in that suit constituted an adjudication of all the matters and things at issue in the case at bar. In the condemnation suit referred to the jury by their verdict awarded the defendants the sum of \$66,600 as compensation for the use of their right of way by the Postal Company, and it is alleged in defendant's answer that the complainant is prosecuting this suit for the purpose of evading the payment of the said award of \$66,600.

The case being at issue, the taking of testimony was commenced, but was adjourned from time to time in consequence of certain negotiations entered into by the parties looking to an amicable settlement of their differences. (Tr., p. 331.) A contract to this end was prepared by the Southern Pacific and submitted to the Postal Company, which made a few suggestions in the way of modifications. (Tr., p. 327; Plaintiff's Exhibit No. 20.) Counsel for the Postal Company discussed with counsel for the Southern Pacific Company this proposed contract of adjustment, and the modifications therein, suggested by the Postal Company, and the Southern Pacific Company's counsel stated that the form

of contract was satisfactory to him (Tr., pp. 328, 329); but the contract was never signed owing to the fact that the Western Union Telegraph Company declined to give its assent to the execution thereof by the Southern Pacific Company. (Tr., p. 330.) Subsequently the Western Union took over the defense of the suit (Tr., p. 330), and thereupon the complainant filed its

SUPPLEMENTAL COMPLAINT

in which were recited the facts of the filing of the original bill and answer, and the unsuccessful attempt of the parties to adjust their differences as hereinbefore related. A copy of the proposed agreement is attached to the supplemental bill (Exhibit "A," Tr., p. 144), and it is alleged that there is a contract existing between the Southern Pacific Company and the Western Union Company under the terms of which the latter company claims the right to prevent the settlement of this action; that the complainant has been unable to obtain a copy of this contract, but alleges, upon information and belief, that said contract is in violation of the Act of Congress of August 7, 1888, the Southern Pacific Company, as a land grant railroad, being subject to the provisions of said act of Congress.

It is further alleged that in addition to owning and maintaining a telegraph line between Eugene and New Era, complainant had also for more than twenty years maintained a telegraph line

along defendant's right of way between Portland and Myrtle Creek and Myrtle Creek and Ashland, in the State of Oregon, and that the right to maintain all of this line was included in the negotiations referred to.

By the prayer complainant sought to require the Western Union Telegraph Company to set forth its contract with the Southern Pacific Company, and further, that the contract between complainant and the Southern Pacific Company (Exhibit "A" of the supplemental bill) be made the basis of a decree to be entered adjudicating the rights of all parties to the suit.

Both the Southern Pacific and the Western Union demurred to the supplemental bill, and the court, having overruled the Western Union's demurrer, the latter filed its

ANSWER TO THE SUPPLEMENTAL BILL

in which it is set forth that defendant "admits that there is a contract between the Southern Pacific Company and the Western Union Telegraph Company, this defendant, by and through which this defendant claims certain rights and privileges regarding the use of the right of way of the railway of the Southern Pacific Company in the supplemental bill set forth; but denies that this defendant claims the right to prevent the settlement of this action except so far as any proposed settlement may injuriously effect any

rights of this defendant. That it claims the right to object to or prevent such or any settlement as will or may involve or interfere with or injuriously affect its own rights. To any other settlement made between the Southern Pacific Company and the complainant, this defendant claims no right to object, unless its approval of such proposed settlement is made a condition upon which the Southern Pacific Company undertakes to execute such agreement, in which case this defendant claims that it may withhold its assent and thereby prevent the execution of said agreement, whether this defendant has any interest in or is to be affected by such agreement or not." (Tr., p. 162.)

That, further, the proposed agreement was laid before the defendant by the Southern Pacific for its consideration, and that the defendant, exercising its option in the premises, declined to approve the proposed agreement, and in pursuance of its terms took over the defense of this suit.

By way of affirmative defense, the Western Union recited the making of an agreement April 1st, 1871, between it and the Oregon & California Railroad Company, under the terms of which the Western Union agreed to construct, maintain and operate the telegraph line required by the Act of Congress, July 25, 1911; and the construction and maintenance of said telegraph line pursuant to the terms of said agreement are alleged. That

on October 1st, 1901, the Southern Pacific Company, the lessee of the Oregon & California Railroad Company, and the Western Union Telegraph Company entered into the agreement set up in the answer and which is the agreement sought to be disclosed by the supplemental bill, and under which, it is alleged, the Telegraph Company has continued to hold possession of said right of way for telegraph purposes, and has performed all requirements of the Act of July 25, 1866, and met all demands of the railroad and of the United States.

In general, this contract provides for the ownership, construction, reconstruction and maintenance of a telegraph line by the Western Union along the right of way of the Southern Pacific, for a stated compensation to be paid by the Western Union, and other considerations, and the particular clause of the agreement around which the controversy in this case centers is as follows:

“Section 9. Exclusive Right of Way. The Pacific Company, so far as it legally may, hereby grants and assures to the Telegraph Company the exclusive right of way along and under the lines and lands and bridges of the railroads, and any branches or extensions thereof covered by this agreement, for the construction, maintenance and operation of lines of poles and wires and underground or other lines for commercial or public telegraph and public telephone uses or business, with the right to con-

struct, at the Telegraph Company's own cost and expense, from time to time, such additional wires and lines of poles and wires as the Telegraph Company may require; the lines to be located on the railroad right of way, lands and bridges in such manner as the Pacific Company may designate. The Pacific Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions which may interfere with the construction and maintenance of the lines and wires provided for hereunder.

"Provided always that, in protecting and defending the exclusive grant referred to in the foregoing paragraph hereof, the Telegraph Company may use and proceed in the name of the Pacific Company, or of any other companies owning the railroads in respect to which this contract is made, but shall indemnify and save it and them harmless from any and all damages, costs, charges and legal expenses incurred therein or thereby.

"And the Telegraph Company covenants and agrees to satisfy and comply with any and all judgments or decrees which may be obtained against the Railroad Company in respect to any of the matters in this section mentioned." (Tr., p. 180.)

DECREE

The Postal Telegraph Company, having filed its replication, the further taking of testimony was proceeded with and concluded, and on November 3, 1913, the court entered a decree in favor of the complainant, by the terms of which the contract between the Western Union Tele-

SPECIFICATION OF ERRORS.

The appellants rely upon the following errors of the District Court:

I.

The Court erred in overruling the demurrer of the appellant, Western Union Telegraph Company, to the Appellee's Supplemental Bill.

II.

The Court erred in authorizing, permitting and directing the appellant, Southern Pacific Company, to conclude that certain agreement with the appellee, attached to and made a part of the Supplemental Complaint and marked Exhibit "A."

III.

The Court erred in not dismissing the Supplemental Complaint, because the Court was without jurisdiction to compel the appellant Western Union Telegraph Company to give its assent to the execution of the said contract between appellee and appellant, Southern Pacific Company.

graph Company and the Southern Pacific Company, hereinbefore referred to, "in so far as the said Western Union Telegraph Company is by said contract granted the exclusive right and privilege of occupying the right of way of the Southern Pacific Company for maintaining telegraph lines," is declared to be "contrary to public policy, nugatory and void and of no effect whatever"; and, further, the defendant Southern Pacific Company is authorized, permitted, directed and commanded to conclude the tentative agreement which had been drawn up between the Southern Pacific Company and the Postal Telegraph Company; and the defendant Western Union Telegraph Company is enjoined from interfering with the execution of said contract. (Tr., pp. 203 to 213.)

A decision of the other issues in the case—the complainant's claim of a prescriptive right, the Southern Pacific Company's contention that its entire right of way was necessary for railroad purposes, and the defense of prior adjudication—was rendered unnecessary by the court's decree directing the execution of that agreement.

POINTS AND AUTHORITIES

I.

A court of equity will not allow the complainant by a supplemental bill to reconstruct entirely the case made by the original bill, by the introduction of an additional case, but the new

facts alleged in a supplemental bill must be such merely as go to support and strengthen the allegations of the original bill.

Encyc. Pl. & Pr., Vol XXI, p. 20.

Higginson v. Chicago, B. & Q. R. Co., 102 Fed. 197.

Smith v. Pyrites Mining & Chemical Co., 43 S. E. 564; 101 Va. 301.

Swedish-American Nat. Bank v. Dickinson Co., 69 N. W. 455; 6 N. Dak. 222.

II.

A new and independent cause of action which has accrued since the filing of the original bill of complaint, and upon which a recovery may be had without regard to the cause of action originally stated, cannot be set up in a supplemental bill or complaint.

Barker v. Prizer, 150 Ind. 4; 48 N. E. 4.

III.

The permissive enjoyment of an easement cannot give title by prescription, however long it may be continued.

Null v. Williamson, 78 N. E. 76; 166 Ind. 537.
Chicago, B. & Q. R. R. Co. v. Ives, 66 N. E. 940; 202 Ill. 69.

Phoenix Ins. Co. v. Haskett, 67 P. 446; 64 Kan. 93.

Beach v. Morgan, 41 A. 349; 67 N. H. 529.

Abraham v. Owens, 20 Ore. 511.

Kirk v. Smith, 22 U. S. (9 Wheat.) 241.

IV.

An offer to purchase after the expiration of the full prescriptive period tends to show that the use during the prescriptive period was not adverse.

American Bank Note Co. v. New York Elevated R. R. Co., 129 N. Y. 252, 268.

Perrin v. Garfield, 37 Vt. 304.

Tacy v. Atherthon, 36 Vt. 503.

ARGUMENT

A great deal of testimony was taken by the complainant for the purpose of showing that the telegraph line of the Postal Telegraph Company could be maintained and operated along the Southern Pacific Company's right of way without interfering with the operation of the railroad, and in particular it was sought to be shown that the maintenance and operation of a telegraph line on the same side of the right of way with the railroad's block signal system would not cause any interference with the operation of the railroad signal system by induction. We do not apprehend that that question will be of importance in the final decision of this suit, and content ourselves with merely calling the attention of the court to the clear and convincing testi-

mony on this point of the witness McKeen for the appellants.

Before discussing the court's action in decreeing the execution of the tentative agreement between the Southern Pacific Company and the Postal Telegraph Company, we wish to submit the following remarks as to the propriety of allowing the complainant to file its supplemental bill.

Supplemental Bill Not Proper

Both defendants demurred to the supplemental bill, and the record shows that the demurrer of the Western Union Telegraph Company was overruled by the court. It should have been sustained, if for no other reason than that the matters averred were not matters proper to be brought before the court by supplemental bill.

It is true that the office of a supplemental bill is to set up new matters which have arisen since the filing of the original bill, but it is also true that this new matter must not be such as that it changes the cause of action, or such as that a recovery could be had upon the new facts brought forward independently of the averments of the original bill.

The case of *Swedish-American Nat. Bank v. Dickinson Co.*, 69 N. W. 455, 6 N. Dak. 222, contains a full and learned exposition of the rule which we have stated. The plaintiff in that case

sued upon promissory notes, and while the suit was still pending he recovered in the State of Minnesota, against the same defendants, a judgment upon the identical causes of action embraced in the complaint in the North Dakota case. Thereafter counsel for plaintiff applied to the court for permission to file a supplemental complaint. The District Court refused to grant this motion, and on appeal its action was sustained by the Supreme Court.

The court said:

“If the original bill is not defective in substance, new facts may, by supplemental bill, be incorporated into the cause of action, although they necessitate an enlargement or change in the character of the relief originally sought. But in every decision on this point the qualification is stated or plainly to be inferred from the opinion that a new cause of action cannot be substituted for the one set forth in the original pleading. *Jacob v. Lorenz*, (Cal.) 33 Pac. 119-121; *Candler v. Pettit*, 1 Paige, 168; *Jaques v. Hall*, 3 Gray, 194; *Winn v. Albert*, 2 Md. Ch. 42; *Edgar v. Clevenger*, 3 N. J. Eq. 258. But in the case at bar the plaintiff does not seek to enlarge its relief or alter the character thereof. It merely asks that it be allowed to obviate a perfect defense to its causes of action on the notes, and recover the same money judgment upon an entirely distinct cause of action, not in existence when it brought the suit, but arising subsequently to its conclusion.”

Numerous cases are cited in the opinion and quoted from, demonstrating the soundness of the rule adopted by the court. On rehearing the plaintiff, while conceding the rule that the supplemental bill must not contain a new cause of action, urged that in truth the cause of action was the same in both the supplemental and the original complaints, inasmuch as the debt and the defendant's failure to respect it, was, according to the contention, the cause of action. But the court showed clearly the unsoundness of this contention, saying that "in every case there is present the fact that the defendant has neglected to observe his legal duty to the defendant," and "A plaintiff's primary right in an action upon a note is the defendant's duty to him which the note creates. When a judgment is rendered upon such note, the primary right is the defendant's duty to the plaintiff created by such judgment, and not by the note, which has ceased to be the source of any duty of the defendant to the plaintiff."

Barker v. Prizer, 150 Ind. 4, 48 N. E. 4, was an action to recover damages for slander. In her complaint, plaintiff alleged that the words complained of were uttered on July 9, 1895, and on August 9, 1894; and afterward plaintiff filed a supplemental complaint alleging that at other times, subsequent to the filing of the original complaint, the defendant had spoken other slan-

derous words, for which additional damages were asked.

In discussing the right to set up such matters in a supplementary bill, the court, after stating that the code of the State of Indiana, in permitting supplemental pleadings to be filed, intended to follow the former rule recognized in courts of chancery, and that therefore the authorities on chancery procedure might properly be applied to in order to ascertain the nature and purpose of a supplemental bill, said:

“It is well affirmed by the authorities that the facts set up by way of supplemental bill or complaint may be consistent with and in aid of the case made by the original complaint. But the question with which we have to deal in this appeal is, can a new and independent cause of action, which has accrued in favor of the plaintiff since the filing of the original complaint, and upon which a recovery may be had without regard to the cause of action stated in the latter, be set up by means of a supplemental complaint, and a recovery authorized thereon in the suit? The question, under a rule firmly settled, must be answered in the negative. See *Milner v. Milner*, 2 Edw. Ch. 114; *Watson v. Thibou*, 17 Abb. Prac. 184; *Tiffany v. Bowerman*, 2 Hun. 643; *Pinch v. Anthony*, 10 Allen 470; *Bull v. Rothschild*, 4 N. Y. Supp. 826.”

In *Higginson et al. v. Chicago B. & Q. R. R. Co.*, 102 Fed. 197, 200, *Higginson et al.* filed a supplemental bill in a case originally brought by the

same complainants against the Chicago, Burlington & Quincy Railroad Company and the board of transportation for the State of Nebraska, as then constituted, wherein the complainants succeeded, after lengthy litigation, in obtaining a decree which, in substance, restrained the defendants in the original case from putting in force a certain scale of rates prescribed by the Legislature of Nebraska. The supplemental bill alleged that afterwards the board of transportation had made certain orders reducing the freight rates on certain commodities and requiring the railroad company to appear before the board and show cause why such orders should not be enforced; but that the power to prescribe rates and hear complaints of such nature had been taken away from said board, and an injunction was asked to restrain the board from entering upon such hearing.

Relief was denied on the ground, among others, that, as the court said:

“This question was in nowise raised or considered in the original case in which the supplemental bill has been filed, but is essentially a new question, and we do entertain grave doubts whether a supplemental bill to settle that question can be lawfully entertained consistently with established rules of procedure in equity. It would seem to be more appropriate to litigate a new question of that nature by an original bill, and this is an additional reason which has induced

us to approve of the action of the Circuit Court in denying a temporary injunction."

The cases which we have cited sufficiently show the scope and limitations of a supplemental bill in equity. The substance of those decisions is that the supplemental bill must not state a new cause of action, and must not set up facts upon which a recovery could be had independent of the cause of action originally stated.

The supplemental bill filed in this suit exceeds the bounds which have been set to a pleading of that nature. By the original bill the complainant sought to establish its right by prescriptive use to maintain and operate its telegraph line along the right of way of the Southern Pacific Company between Eugene, Lane County, Oregon, and New Era, Clackamas County, Oregon. By its supplemental bill complainant asked the court to decree the execution of a tentative agreement for the maintenance and operation of complainant's telegraph line along the Southern Pacific's right of way between Portland and Myrtle Creek in Oregon. The subject matter of the two suits is different; the relief prayed for is altogether different. Nor is it significant, as pointed out in *Swedish-American National Bank v. Dickinson*, *supra*, that by both bills it was sought to secure the use of the defendant's right of way. The causes of action are none the less entirely different; and if recovery on the new

facts set up in the supplemental bill is proper, that recovery could be had regardless of the matters alleged in the original bill.

It was not, therefore, proper to bring this new matter in by supplemental bill, and the demurrer of the Western Union Telegraph Company should have been sustained.

The Court Was Without Power to Decree the Execution of the Tentative Agreement

We question the power of a court of equity to compel parties to make an agreement against the wish of one of them, under the circumstances disclosed by the testimony in this case.

The agreement which is made the ground of the decree is tentative merely and binds nobody. Its terms had been distinctly agreed upon by the appellee and the Southern Pacific Company and a decree had been formulated which would probably afford sufficient cause to warrant the court to enter it of record, if the agreement had been concurred in by the Western Union Telegraph Company and executed by the parties to it. But since the Western Union Company refused its concurrence and the Southern Pacific Company on that ground refused to execute it, it is difficult to perceive how it can have any binding force for any purpose.

It must be conceded that if the Southern Pacific Company had an interest in the right of

way which the appellee desires to acquire, it may make its own terms upon which it will dispose of such right, provided such terms are not unlawful. The complainant and the Southern Pacific Company made this agreement with the understanding, so far as appears, that it must have the approval of the Western Union Telegraph Company. This was a condition precedent to its having any vitality or legal force. Nobody can reasonably claim that the condition was unlawful, or one which the parties or either of them must not lawfully attach to the contract and make the performance of the condition necessary to give validity to it. If this is true, the refusal of the Western Union Telegraph Company to approve is decisive against appellee's demand, upon this ground. The agreement is simply inoperative and void, and this ought to be conclusive against it.

At the trial below it was assumed in argument, by counsel for appellee, that the condition attached to the agreement depends for its validity upon whether the Western Union Telegraph Company has any interest in the subject matter of the agreement, and if it has none then it is not a condition and the agreement is binding without it. Nothing of this sort appears in the proposed agreement. The question of the interest of the Western Union Telegraph Company is not hinted at. It is a plain statement in effect that the consent of the Western Union Telegraph

Company must be had before the agreement will be binding. The Southern Pacific Company had a right to submit the proposed agreement to anyone it pleased as a condition precedent to its going into effect, and the party so selected may be someone having an interest or not. It was wholly a matter of discretion.

It is difficult for us to perceive how the court could grant the relief prayed for, so far as it rests upon this agreement, without its approval by the Western Union Telegraph Company, and since that company refused such approval the court must find a way to compel it to approve. It is not possible to conceive where such authority can be found. The Southern Pacific Company does not repudiate the contract, because it says it was never made, except with the condition annexed which had not been performed. This leaves the agreement with but one party to it, and the court could not properly grant the relief prayed for by appellee without not only ordering the Western Union Company to consent to the agreement but also ordering the Southern Pacific Company to execute it. Otherwise there is no executed agreement before the court and no basis for a decree.

It was also agreed below, that because the answer to the supplemental bill admitted that the tentative agreement set out was made, that fact warranted the court in accepting the draft of the

decree set out therein and entering it as the final determination of the parties' rights.

The fallacy of that argument seems too plain to need notice. The allegation in the bill and the supplemental bill that this tentative agreement had been entered into was true and could not truthfully be denied, but it appeared on the face of the pleading that the agreement was upon condition which had not been performed. How can it be said that the admission of the fact enlarged the rights of the appellee when the admission is accompanied by the denial that the agreement has any force for want of performance of the condition upon which its validity rests?

Prescriptive Right Not Established

In order to establish its claim to a right to maintain its line upon the right of way of the Southern Pacific Company by adverse possession for longer than the statutory period, appellee called to the stand a number of its officers and employes, the substance of whose testimony was that since the year 1887 the Portland office of the Postal had been connected with the San Francisco office by a telegraph line that is now in operation over the right of way of the Southern Pacific Company, and that repairs had been made upon the telegraph line from time to time without any objections on the part of the Southern Pacific Company prior to the year 1911. There is also the testimony of several of these witnesses

to the general effect that they could determine how long a telegraph pole had been in the ground from its appearance, and that an examination disclosed that many of the poles of the Postal Telegraph Company on the Southern Pacific right of way were from 20 to 30 years old. (Tr., pp. 290, 301, 304.)

But the evidence is convincing that the complainant's use of the right of way, however long it may have continued, was in fact never adverse.

The principle is well established and, we take it, will not be called in question, that an offer to purchase after the expiration of the full prescriptive period strongly tends to show that the use during the prescriptive period was not adverse. In the case of *American Bank Note Co. v. N. Y. Elevated R. R. Co.*, 129 N. Y. 252, 268, it was said:

“But there is still another fact to be considered. After the expiration of twenty years from July 2, 1868, and during the pendency of the present action, the defendants instituted proceedings to condemn the plaintiff's street rights. There is no question over the admissibility of the evidence, for the defendants themselves gave the proof. The proceeding was necessarily a solemn and formal admission of record of title in the plaintiff to the incorporated rights in question. It is to be granted that such an admission made after the prescriptive right had been acquired would not serve to destroy it. But the admission is evidence, reflecting back on what has occurred,

and tending to show what the real character of the possession claimed to be adverse in truth was. (Perrin v. Garfield, 37 Verm. 306.) The company learned what its own possession and that of its predecessor had actually been, and it is hardly conceivable that, if such possession had been adverse either in fact or in intention, an admission would be formally made of ownership in the easements outstanding in the abutter."

That case is on all fours with the facts in the case at bar.

The use of the Southern Pacific's right of way by the Postal Company was, from its inception, a permissive use. By an order of Hon. Matthew P. Deady, Judge of the Circuit Court of the United States for the District of Oregon, dated December 1, 1886, while the Oregon & California Railway Company was in the hands of a receiver, the Pacific Postal Telegraph-Cable Company was given permission to erect its poles and maintain its lines upon the following portions of the right of way of the railroad company, and for the period indicated:

"From Portland, Oregon, south fifteen miles to Oregon City; and from a point near Eugene City to Goshen; and from the station of Yoncalla on said railway to Roseburg, and from about one mile in length near the station of Woodburn on said railroad; and that said petitioner be also permitted to run its telegraph wire, with the necessary appurtenances, across the Willamette

River, on the bridge of said railway company across said river near the station of Harrisburg, and that the twelve poles already placed by petitioner upon land which is in dispute as between said railway company and the alleged private owner thereof, be permitted to remain upon said land, so far as the title of said railway company to said land may be concerned; but nevertheless this order is upon the express condition that the petitioner, in availing itself of the privileges hereby granted to it, of going upon the right of way of the said railway company, and using the said railway bridge in the construction of its telegraph line, shall in no way interfere with the operations of the said railway company, nor cause said company any material damage or inconvenience, and that said privileges are granted merely for the time being, and shall not in any event extend beyond the period during which the said railway company remains in the charge and under the control of this court, by reason of the present receivership."

Mr. Koehler, the receiver, afterwards manager for the Southern Pacific Company when that company leased the railroad, testified that the encroachments upon the right of way for the distance of about four miles between New Era and Eugene, he thought were made shortly before or immediately after the petition was filed, and that such encroachments were made with the permission of the court. (Tr., p. 306.) "That he allowed the telegraph line to remain upon the right of way while he was general manager

because it did not interfere with the operation of the line, and because their relations with the Postal Company were quite friendly; that this company helped the railroad company off and on. That no negotiations were had between the Southern Pacific Company and the Pacific Postal Telegraph-Cable Company at the termination of the receivership; that the latter company simply remained on the right of way and nothing took place. That the witness understood that they were there at the will of the railroad company, with the understanding that the railroad company would not remove the Postal line unless there was some necessity for it. That up to 1904 the witness never heard of any claim being asserted by the Pacific Telegraph-Cable Company, or by the Postal Telegraph Company of Oregon, or any affiliated company, to the effect that these poles and wires were there by any right in the Postal Company. That up to 1904, at which time the witness gave up the management of the road, he never heard of any claim of ownership by the Postal Company or any company which claimed to own this telegraph line, of any ownership in the right of way, or of any claim other than the right given by order of the court, and that during all that period the witness was willing to permit the Postal Company to remain on the right of way so long as it did not interfere with the operation of the road, and did so permit it to remain." (Tr., pp. 308, 309.)

Mr. C. G. Sutherland, who had worked in various capacities for the Southern Pacific Company where he would be in a position to know whether any transactions were taking place between the Postal Companies and the Southern Pacific Company, testified that he had never heard of any claim being asserted by any of the Postal Companies of any right in the property of the Oregon & California Railroad right of way until July, 1911, at which time Mr. Blake, General Superintendent of the Postal Company, stated that that company intended rebuilding their line between Eugene and Springfield Junction, and between Portland and Salem:

“That a few days later Mr. Annand made request on the Southern Pacific Company for outfit cars for use of gangs in renewing the line above referred to, and a few days later wanted a work train assigned to him to distribute poles and other material, which the railroad company declined to do, for the reason that the Postal Company had declined to enter into any agreement with the railroad company in regard to their right to be upon the railroad right of way. The witness stated that at the conference with Mr. Blake, in 1911, Mr. Blake claimed that the Postal Company had a prescriptive right in the right of way. That the Postal Company claimed the right by prescription—a right of way for such poles and wires as were already upon the right of way of the company, and that he had never heard of any such claim on the part of the Postal Company prior to that date.” (Tr., p. 311.)

We have already called attention to the fact that the Pacific Postal Telegraph-Cable Company commenced proceedings against the railroad company in October, 1907, to condemn a right along the entire right of way of the railroad for telegraph purposes, from Portland to the California state line. The territory sought to be condemned includes within it the portion from New Era to Eugene which is claimed to have been acquired by prescription.

We submit that the evidence of Koehler and Sutherland, in connection with this "solemn and formal admission of record of title in the plaintiff to the incorporeal rights in question" (as said by the court in *American Bank Note Co. v. N. Y. Elevated R. R. Co.*, *supra*) is conclusive on the question of prescription, and demonstrates that after the receivership, as well as before, the possession of the Postal Telegraph Company and its predecessor in interest was permissive and not adverse.

For the reasons advanced, the decree of the District Court ought to be reversed.

Respectfully submitted,

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